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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944.

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DeMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Julius H. Miner, as Judge of the Circuit Court of Cook County, Illinois, and Paul Willer Petersen, respectfully show:

A.

Summary Statement of the Matter Involved.

This is an original action of mandamus brought in the Supreme Court of Illinois by the respondents here, seeking the issuance of an original writ of mandamus direct-

ing petitioner here, Paul Willer Petersen, to dismiss, with prejudice, an action instituted by him against the respondents, in the Circuit Court of Cook County, Illinois, and directing petitioner Julius H. Miner, as Judge of the Circuit Court of Cook County, Illinois, to (a) expunge orders, entered in the action brought by petitioner Petersen, which required the corporate respondent and certain of the individual respondents to file a sworn list of documents, books, accounts, letters and other papers which are or had been in its or their respective possession and material to the merits of the matter in question in said cause; (b) expunge an order which overruled and denied respondents' motion to dismiss, for want of jurisdiction, the suit of petitioner Petersen and expunge all subsequent orders entered by him, and (c) enter an order in said cause sustaining respondents' motion to dismiss said suit for want of jurisdiction, and enter judgment thereon that said cause be dismissed, for want of jurisdiction (Rec. 40).

Petitioner Petersen had previously (Rec. 10-16) filed an action, on behalf of himself and all other members of the Benefit Association of Railway Employees, a mutual insurance company, and on behalf of holders of insurance policies and certificates issued by that company, seeking:

(a) The removal of the individual respondents as officers and directors of that company, that such offices and directorships be declared vacant, the ordering of a new election to fill such vacancies and the direction that the individual respondents be declared ineligible for re-election thereto (Rec. 15);

(b) That the individual respondents be required to render a true and full account to that company of all company funds by them wrongfully disbursed and distributed and to restore and repay the same to the company (Rec. 15).

The allegations of Petersen's complaint, under which such relief was sought, were that on April 24, 1927, the company had entered into an agreement with respondent, Arthur J. Lindsley, whereby the company agreed to pay him, for a period of ten years thereafter, twenty per cent of the net premiums paid to the company, the said Lindsley to bear all expenses of securing business and of commissions to agents and to pay the compensation of the company's President, First Vice President and Second Vice President, which agreement further provided that the said Lindsley was, thereafter, to be the exclusive agent of the company in and for the procurement of policy holders (Rec. 11).

It was further alleged that the said Lindsley was, at the time of the making of the contract, the nominee of a co-partnership for whose benefit the agreement was entered into by him, which co-partnership consisted of himself and certain other individual respondents (Rec. 11). The complaint further stated that, on November 23, 1935, the contract was modified by extending it to November 23, 1955 (Rec. 11); that at the time of such extension certain of the designated individual respondents, who were then co-partners with the said Arthur J. Lindsley in such agency contract, were also officers of the company (Rec. 11, 12).

It was further alleged that although such contract was, on July 2, 1938, further amended by changing the name of the contracting party from Arthur J. Lindsley to Lindsley Agency, and by eliminating the provision designating such agency as the exclusive agent of the company, nevertheless some of the individual respondents, as co-partners, continued to be the sole and exclusive agents of the company (Rec. 12).

It was further alleged that the agreement of April 24, 1927, and the modifications and amendments thereto of November 23, 1935, and July 2, 1938, were illegal and void under the statutes of the State of Illinois (Rec. 12).

It was further alleged that certain of the individual respondents, in addition to being co-partners in the agency, were directors of the company at the time of the filing of the suit and for many years prior thereto, and that other of the individual respondents were also officers of the company; that, as such officers, the compensation of Mr. O'Hara, Mr. Ward, Mr. Lindsley, Mr. Bloomfield and Mr. Street had at all times, from 1927 to and including 1942, exceeded $200.00 per month (Rec. 12, 13).

The complaint further alleged that the company, since its inception, had never returned or paid a dividend to its policy holders and that the directors had, by the device of donations to various clubs and lodges of an associate Order of Benefit Association of Railway Employees, made rebates of premiums to certain policy holders in violation of their duty to charge and assess all members and policyholders of each class equally (Rec. 13).

It was further alleged that the company had filed a false and fraudulent report with the Director of Insurance of the State of Illinois for the year 1941, stating that no person while an officer, director or trustee received compensation on business transactions of the company, directly or indirectly, when in truth and fact certain respondents, who were officers of the company, had participated in the twenty per cent commission paid by the company to the agency (Rec. 13).

It was further alleged that no partner in or member of the agency, on or subsequent to January 1, 1934, had been licensed or authorized to act as, or conduct an insurance agency by the State of Illinois and that all sums paid to the agency and its partners as commissions, pursuant to such contract, were illegally paid in violation of the statutes of the State of Illinois (Rec. 13, 14); that all such payments were, in addition, unconscionable for the benefits received by the company therefor (Rec. 14) and that the company had wrongfully paid to the individual respondents under such agency contract, in the following years, the following sums (Rec. 14):

1934—$466,118.35
1935—$504,653.45
1936—$564,792.82
1937—$648,834.98
1938—$668,121.57
1939—$739,439.30
1940—$880,879.62
1941—$982,591.30

It was further alleged that the amount paid in 1942 was unknown to petitioner Petersen but within the knowledge of respondents; that the so-called agency had utilized the company's offices and clerical help without payment to the company therefor (Rec. 14) and that a demand had been made by petitioner Petersen upon the directors of the company to institute a suit on behalf of the company to require the individual respondents to pay over and return to the company the funds so disbursed by or received by them, which demand had been refused (Rec. 15, 16).

Thereafter, petitioner Petersen moved for an order upon certain respondents to show cause why they should

not produce, for inspection and copying, all agreements between them and other respondents pertaining to the division of moneys received by them from the corporation and for an order upon the corporation and certain individual respondents to file a sworn list of all documents, books, accounts, letters and other papers then or previously in their possession and an order to that effect was entered over the objection of such respondents Rec. 25, 26).

Thereafter respondents filed a motion to dismiss the complaint on the ground that the Court had no jurisdiction to entertain the suit but that such suit could be maintained only by the Director of Insurance represented by the Attorney General, pursuant to the provisions of 1943 Ill. Rev. Stat., Chap. 73, par. 813 (Rec. 27).

That motion of respondents being overruled (Rec. 28, 29), the respondents filed answer to the complaint, again raising the defense that the Court had no jurisdiction to entertain the suit upon the application of petitioner Petersen, and, in general, denying, without setting forth any facts, the allegations of petitioner Petersen's complaint (Rec. 31-33).

Thereafter the respondents filed their original action of mandamus in the Supreme Court of Illinois seeking the relief heretofore stated (Rec. 3-43).

The Supreme Court of Illinois first filed an opinion denying respondents' petition for the writ of mandamus (Rec. 75-82). A petition for rehearing was filed by respondents (Rec. 83-88), answer thereto was filed by the petitioners (Rec. 88-91) and rehearing was allowed by the Supreme Court of Illinois (Rec. 88). Upon rehearing

a new opinion was filed awarding the writ of mandamus (Rec. 91-98) and petitioners in apt time filed a petition for rehearing (Rec. 103-116), and rehearing was denied on September 18, 1944 (Rec. 117).

Petitioners, in their answer to respondents' petition for rehearing, filed after the entry of the first opinion of the Supreme Court of Illinois, stated:

> "To issue the writ of mandamus would deprive Petersen of his right and remedy in contravention of the Fourteenth Amendment, while the refusal to issue the writ could not deprive these directors of due process of law" (Rec. 91).

It was further stated therein, that the granting of a writ of mandamus would deprive the stockholders of the corporation of their only remedy for enforcement of the corporate right to an accounting from these directors, leaving no opportunity to protect it, for the directors themselves would not act (Rec. 89).

In the petition for rehearing filed by the petitioners, after the second opinion of the Supreme Court of Illinois, petitioners stated, in substance, that the Supreme Court of Illinois by finding, as a *matter of fact,* that petitioner Petersen's suit would interfere with the prosecution of the business of the insurance company, had foreclosed him, without a hearing and denied him the opportunity to present evidence disclosing that the successful prosecution of his action would not interfere with the prosecution of the company's business, and that such factual finding deprived him of property without due process of law, citing *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (Rec. 113, 114, 116).

The only reference, in either opinion of the Supreme Court of Illinois, to the federal question so presented is the statement that:

> "Petersen *may* (italics ours) have his remedy by application to the Director of Insurance, requesting the bringing of such a suit, or correction of the evil he says exists. It cannot be presumed that the Director, upon proper showing, would refuse to take such action as may be required to remedy the situation. If he should refuse so to act, review of his decision can be had under Section 407 of the Insurance Code. In *American Surety Company* v. *Jones,* 384 Ill. 222, it was held, citing *People ex rel. Gosling* v. *Potts,* 264 Ill. 522, that mandamus will lie to compel the Director of Insurance to do his duty under the statute" (Rec. 98).

B.

Jurisdictional Statement.

Jurisdiction is conferred upon this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 344 (b)). The judgment of the Supreme Court of Illinois, which is sought to be reviewed, was filed May 16, 1944, and petitioners' petition for rehearing was denied September 18, 1944. This petition is filed within three months thereafter, as prescribed by the Act of February 13, 1925, Ch. 229, Sec. 8, 43 Statutes 940 (28 U. S. C. Sec. 350) and *The Department of Banking, State of Nebr.* v. *Pink,* 317 U. S. 264, 266.

C.

Questions Presented.

1. Whether it is not a violation of the Fourteenth Amendment to the Constitution of the United States for

a Supreme Court of a state, in an action in which no factual issues are involved and in which the Court has no means of determining factual issues, to deprive a corporation and its members of their sole remedy to require the accounting of and return to the corporation of moneys illegally and unconscionably misappropriated to their own use by its officers and directors when such deprivation is made upon an assumption, by that Court, of facts not disclosed by the record before it and upon which assumptions no evidence was offered nor an opportunity therefor afforded.

2. Whether it is not a deprivation of property without due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, for a state Supreme Court to determine, *as a matter of law*, that a derivative action, for the benefit of an insurance corporation against its officers and directors, for the misappropriation of corporate funds constitutes, *as a matter of fact*, an interference "with the prosecution of the business" of the company which would thereby bar the action under a state statute.

3. Whether the holding applicable, by a state Supreme Court, of a state statute, enacted for the rehabilitation, liquidation, conservation and dissolution of insurance companies, and which prohibits (except in a suit by the Director of Insurance) the entry of an "order, judgment or decree enjoining, restraining or interfering with the *prosecution of the business*" (italics ours) of an insurance company, to an action on behalf of the company for an accounting from its officers and directors, thereby prohibiting such action, does not deprive the company and its members of property without due process of law.

D.

Reasons Relied on for Allowance of Writ.

The insurance company, here involved, has 309,715 persons, exclusive of their wives, children and other family members, insured of which only 34,209 are residents of the State of Illinois (Rec. 8), which is the state of the company's incorporation and the state of residence of its officers and directors as well as of petitioner Petersen. The company is licensed to do business in forty-two states, and the District of Columbia (Rec. 5).

The practice of the respondents here is one followed by many mutual insurance companies, large and small, throughout the United States, as the method adopted by the promoters of the company to enable them to withdraw profits. This practice results in the members being deprived of the benefit of lower premium rates without there being any corresponding substantial benefit to the company and its members for the large sums withdrawn under the guise of "overriding commissions" or "for supervision of agents."

Not only are the questions here presented substantial, but they are, also, of first impression. Although in similar cases two state Insurance Directors have refused to renew the licenses of insurance companies which paid their officers and directors unconscionable sums, there has been, we believe, no case yet reported where the restoration of those funds to the company has been sought on that basis. By its decision the Supreme Court of Illinois has, without due process of law, deprived the corporation and its members of their property rights, viz.: their chose in action against the officers and directors, and its decision is not in accord with applicable decisions of this honorable Court.

E.

Prayer.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable Court directed to the Supreme Court of the State of Illinois, to the end that the judgment of the Supreme Court of Illinois may be reviewed and reversed by this honorable Court.

JULIUS H. MINER,
as Judge of the Circuit Court of Cook County, Illinois, and
PAUL WILLER PETERSEN

By: CHARLES AARON,
Counsel for Petitioners.

CHARLES W. STIEFEL, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The second opinion of the Supreme Court of Illinois is reported in the advance sheets at 387 Ill. 393 and is printed in full in the record (Rec. 91-98). The first opinion of the Supreme Court of Illinois also appears in full in the record (Rec. 75-82).

II.

Statement of the Case.

The material facts with reference to the origin and history of the case, the grounds on which the jurisdiction of this Court is invoked and the issues and questions presented have been stated in the preceding petition.

III.

Specification of Errors to Be Urged.

1. The Supreme Court of Illinois erred in awarding the writ of mandamus.

2. The Supreme Court of Illinois erred in not denying the writ of mandamus.

3. The Supreme Court of Illinois erred in holding that petitioner Petersen's action was within the purview of Section 201 of the Insurance Code (1943 Illinois Rev. Stats. Chap. 73, par. 813).

4. The Supreme Court of Illinois erred in not holding that Section 201 of the Illinois Insurance Code (1943 Illinois Rev. Stats. Chap. 73, par. 813) did not apply to petitioner Petersen's suit.

5. The Supreme Court of Illinois erred in failing to hold that to award the writ of mandamus would deprive the corporation of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

IV.

ARGUMENT.

A.

Petitioner and the corporation on whose behalf he instituted his suit, have been denied due process of law, in its primary sense, of their opportunity to present their case.

The right to sue is a property right *Angle* v. *Chicago M. & St. P. R. Co.,* 151 U. S. 1.

The right, in equity, of shareholders of a corporation to sue on behalf of, and for the benefit of the corporation, where the officers and directors themselves refuse to act, or are themselves the party at fault, has been long established. *Bruschke* v. *Der Nord Chicago Schuetzen Verein,* 145 Ill. 433; *United Copper Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435; *Chicago* v. *Mills,* 204 U. S. 321; *Dodge* v. *Woolsey,* 18 How. 331.

The suit instituted by petitioner Petersen was of that character, seeking as it did an accounting to the corporation by its officers and directors and the restoration to it of the funds wrongfully withdrawn from it. The bases of petitioner's claim that the acts of the directors and officers (individual respondents here) were wrongful, were:

(a) That the contract between the company and its officers and directors was illegal and void under the statute of Illinois, in effect at the time it was entered into and at the time it was extended, which provides, in substance, that no insurance company shall agree to pay its officers, trustees or salaried employees any salary or other compensation, directly or indirectly, for more than

three years and no officer, director or trustee, who is paid a salary for his services of more than $200.00 per month, shall receive any other compensation directly or indirectly. (1935 Ill. Rev. Stats. Chap. 73, par. 382 (originally enacted 1907)).

(b) That the payments made by the company to officers and directors were illegal because such payments were in violation of the statute of the State of Illinois which provides, in substance, that no person shall act as an insurance agent without a license and that moneys may be paid for the solicitation or negotiation of insurance contracts only to licensed persons. (1935 Ill. Rev. Stats. Chap. 73, par. 564). The recipients of the payments here were not licensed by the State of Illinois, nor was the agency in which they were partners.

(c) That even if such payments were legally made, the amounts paid were unconscionable in view of the lack of benefits received therefor by the company, particularly as all the agency's requirements of quarters and office help were furnished, without charge, by the company.

To that complaint respondents filed a motion to dismiss and their petition for mandamus was directed to obtaining the expunging of the order of petitioner Miner overruling that motion.

The record, as presented to the Supreme Court of Illinois in the mandamus hearing, consisted of petitioner Petersen's complaint, the motion and order for the production and inspection of books and records and the motion to dismiss the complaint. The petition for mandamus (Rec. 4-9, 34-39) made numerous allegations of fact which were denied by respondent Petersen's answer to the petition for mandamus (Rec. 51-54). The Supreme

Court of Illinois, admittedly, has no means for trying issues of fact, nor were any presented to it (Rec. 72-74, 81) and, as a result, the issues in the mandamus action were treated as closed upon respondents' motion to treat petitioner Petersen's answer to the petition for mandamus, as a demurrer and upon the respondents' special demurrer to petitioner Miner's answer (Rec. 69) which answer stated that he had no knowledge of the facts alleged in the petition for mandamus as the same had never been presented to him (Rec. 47-49).

In this state of the record, the allegations contained in the original complaint of petitioner must be deemed true.

The only ground of respondents' motion to dismiss and the ground upon which they sought a writ of mandamus was that petitioner Petersen's suit came within the purview of Section 201 of the Illinois Insurance Code (1943 Ill. Rev. Stats., Chap. 73, par. 813), the relevant portions of which provide:

> "No order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of any company, or for the appointment of a temporary or permanent receiver, rehabilitator or liquidator of a domestic company, or receiver or conservator of a foreign or alien company, shall be made or granted otherwise than upon the petition of the Director (of Insurance) represented by the Attorney General as provided in this article."

That section of the Insurance Code has always been, since its enactment, a part of Article XIII of the Insurance Code providing for the "rehabilitation, liquidation, conservation and dissolution of companies" (1943 Ill. Rev. Stats. Chap. 73, page 1871).

The Supreme Court of Illinois, in its first opinion held that whether or not petitioner Petersen's suit could constitute an interference with the prosecution of the company's business was a mixed question of fact and law which could not be determined by it but only by the trial court (Rec. 81).

In its second opinion, of which review is here sought, the state Court concluded, without any basis in the record before it, that as *a matter of fact* such suit would constitute an interference with the company's "business"; and, in so doing, ignored the very wording of the statute, itself, prohibiting an order interfering with the "prosecution of the (company's) business," and then assumed the fact that petitioner Petersen's suit did so interfere. His suit would interfere, said the state Court, because if Petersen were successful, the election of new directors would be required which would necessitate the sending out of notice of a meeting to hold such election and, also, the company would be required to employ new agents.

It is, to say the least, obscure, how the sending of a notice of a special meeting for the election of directors could any more interfere with the prosecution of the company's business than could the sending of notice for an annual meeting to be held for that purpose, or the sending of no notice at all.

Prior to the adoption, in 1937, of the Insurance Code, the Illinois statutes provided, (1935 Ill. Rev. Stats. Chap. 73, par. 105 (8 (a))) "No order, judgment or decree providing for an *accounting* or enjoining, restraining or interfering with the prosecution of the business of any domestic insurance corporation" shall be made otherwise than upon petition, etc. Upon the adoption of the In-

surance Code, the language "providing for an accounting" was omitted and it therefore must be presumed that it was the intent of the Illinois Legislature to permit private citizens thereafter to maintain an action for an accounting *against* insurance companies. There never has been a statutory prohibition against a suit for an accounting brought *by* an insurance company or on its behalf.

The state Supreme Court disposed of this contention on the theory that the reason for the statutory change was to enable an insurance agent to obtain an accounting of commissions due him. Such an intent, on the part of the Legislature, would have been expressed by the addition of a proviso, excepting from prohibited accounting actions suits for commissions, not by the elimination from the prohibition, of all suits for accounting.

The finding of fact that if relief were granted in Petersen's suit the company would be required to procure other agents to conduct its business, in lieu of the individual respondents here, is solely unsupported by any evidence and, in fact, wholly ignores the allegation in petitioner Petersen's complaint, which must be taken as true, that the respondents are not the agents of the company having never been licensed so to act and therefore their removal could not require the procurement of new agents.

Likewise, it was ignored that Section 201 of the Insurance Code does not prohibit the *maintenance* of a suit, but only the entry of a judgment, order or decree therein, of the nature prohibited, and that a decree might have been entered in Petersen's action finding that, although the acts of the individual respondents here were not

illegal, the sums withdrawn were unconscionable and should be restored, but, not being illegal, the individual respondents should not be removed from office nor new elections presently held.

Petitioners contend that in awarding the writ of mandamus the Supreme Court of Illinois erred in holding applicable to petitioner Petersen's suit, which was for the benefit of the company, a statute which, by its very terms, applies only to actions *against* an insurance company. There can be no question that if a writ of mandamus had been awarded to prohibit a suit brought by the company, at the behest of a board of directors which succeeded the individual respondents here, it would have been a deprivation of property without due process of law, within the Fourteenth Amendment. There is no difference in law between petitioner Petersen's derivative action and an action by the corporation itself.

In any event, the award of the writ of mandamus based upon assumptions of facts not before the Court, and upon which petitioner Petersen was denied the opportunity to present evidence, is a deprivation of property, without due process of law, within the Fourteenth Amendment, in the primary sense that he and the corporation on whose behalf he sued, have been deprived of all remedies to enforce a right, with no real opportunity to protect it. *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304; *Georgia Ry. & El. Co.* v. *Decatur*, 295 U. S. 165; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673; *Saunders* v. *Shaw*, 244 U. S. 317.

This Court will review and correct errors of fact of a state Supreme Court in assuming a state of facts, without any support in the record, as a basis for denying asserted federal rights. *Postal Telegraph Co.* v. *City of Newport, Ky.*, 247 U. S. 464.

In the mandamus proceeding, all of the allegations of respondents, here, that petitioner Petersen's suit would constitute an interference with the prosecution of the company's business were denied by Petersen; such denials must be taken as true where the case was disposed of on pleadings. *Postal Telegraph Co.* v. *City of Newport, Ky.,* 247 U. S. 464.

This Court will examine the entire record to determine whether, what purports to be a finding upon questions of fact, is so involved with and dependent upon questions of law as to be in substance and effect a decision of the law. *United Gas Public Service Co.* v. *Texas,* 303 U. S. 123; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.,* 223 U. S. 573; *U. S.* v. *Pink,* 315 U. S. 203.

The state Supreme Court awarded the writ of mandamus upon the arbitrary presumption that any decree which might be rendered in Petersen's suit, would interfere with the prosecution of the business of the insurance company and petitioner Petersen was afforded no opportunity to repel that presumption; statutes which created such arbitrary presumptions and deprived a litigant of an opportunity to repel them, have been held violative of the due process clause of the Fourteenth Amendment. *Western & Atl. R. R. Co.* v. *Henderson,* 279 U. S. 639; *Manley* v. *Georgia,* 279 U. S. 1; *Bailey* v. *Alabama,* 219 U. S. 219. Likewise, a deprivation of all remedy will constitute such a violation. *Coombes* v. *Getz,* 285 U. S. 434; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 431.

The rights granted by the Fourteenth Amendment may be violated by judicial decree as well as by legislation as its provisions are addressed to every person, natural or

juridical, who is the repository of state power. *Saunders* v. *Shaw*, 244 U. S. 317; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Scott* v. *McNeal*, 154 U. S. 34.

The judgment of a state Supreme Court, in a proceeding for mandamus, is subject to review under the same conditions as any other judgment. *Detroit, etc. Ry.* v. *Mich. Ry. Comm.*, 240 U. S. 564; *American Express Co.* v. *Michigan*, 177 U. S. 404; *McPherson* v. *Blacker*, 146 U. S. 1; *Hartman* v. *Greenhow*, 102 U. S. 672.

When a judgment of a State Court is challenged, as it is here, as being violative of the due process clause, it becomes the duty of this Court to examine the course of procedure to ascertain whether the litigant, whose rights have been adjudicated, has been afforded the opportunity to be heard as is requisite to the due process which the Constitution prescribes. *Hansberry* v. *Lee*, 311 U. S. 32; *Grannis* v. *Ordean*, 234 U. S. 385.

B.

The Federal Question Was Raised By Petitioners in Apt Time.

In two prior cases the Supreme Court of Illinois had so construed Section 201 of the Insurance Code (1943 Ill. Rev. Stats. Chap. 73, par. 813) as to permit even suits *against* an insurance company by one of its members for redress of internal wrongs, so long as the result of such suit did not prohibit the carrying on of its business, by the company *Dale* v. *Hancock County Mutual Life Association*, 363 Ill. 222; *Bastian* v. *Modern Woodmen of America*, 166 Ill. 595. Those two cases were the only prior decisions of the Supreme Court of Illinois construing that section of the Insurance Code.

In the former case, the Supreme Court of Illinois held that an injunction, granted at the suit of a member of the association, restraining the company from changing from a mutual benefit society to a legal reserve basis, did not fall within the prohibition of that section. In the latter case, the same Court held that an injunction, granted at the suit of a member of the association, restraining the association from moving its principal office from one county to another, was not barred by that section. The injunctions granted in those cases incontrovertibly interfered with the prosecution of the business of the insurance company to a far greater extent than could a decree requiring the sending of a notice of a special meeting for the election of directors.

The state Supreme Court attempted to distinguish those previous decisions on the ground that they concerned only violations, by the officers and directors of the companies there involved, of the companies' articles of association, constitutions or by-laws, while in the instant case the violations charged were of statutory prohibitions. Such a distinction is wholly erroneous upon two grounds. First, the state court did not, in the case of *Bastian* v. *Modern Woodmen of America*, 166 Ill. 595, limit its elimination, from the prohibition contained in Section 201, to suits based upon violation of contract between the association and its members, but included therein (page 608) suits based upon violation of *fundamental laws*. Secondly, it would indeed be anomalous to permit the maintenance, by individual members, of suits, the result of which would constitute an interference with the prosecution of the company's business, where the bases of such suits were violations, by the directors, of the company's by-laws or articles of association but to prohibit such suits where the violations by the directors

and officers were of the statutes of the state itself and the fundamental law of common honesty.

Although such two previous decisions of the Illinois Supreme Court involved insurance companies, in the instant case that Court holds the prohibition of Section 201 applicable, because the company involved is an insurance company. In its first opinion, the state Court stated that petitioner Petersen's action was no different than the derivative action of a stockholder in a general corporation, citing *Atlantic Life Insurance Co.* v. *Moncure,* 35 Fed. 2nd. 360 (Rec. 81). In the second opinion, however, the Court attempted to find a distinction on the ground that an insurance company is engaged in a business charged with the public interest (Rec. 96-98), citing *Swan* v. *Mutual Reserve Fund Life Asso.,* 155 N. Y. 9, 49 N. E. 258, which was a suit by a member against an insurance company for an accounting to the members, not a suit by the company against its officers and directors for an accounting to it.

The basis of this attempted distinction seems to be that an insurance company, in the conduct of its business, is impressed with the public interest and subject to regulation by the state under its police power. The state, however, exercised its police power and, in its exercise, saw fit to prohibit the entry of only those types of order, judgment or decree as are set forth in Section 201 and then only in suits instituted by persons other than the Director of Insurance. The state thereby recognized the distinction between insurance and other companies, as such limitations are not placed upon its courts in suits against companies conducting other than an insurance business. The action of the state Court, in extending by judicial construction the scope of those limitations, in

itself constitutes an exercise of police power, by the Court. In any event, the holding that the nature of the company's business alters the character of Petersen's suit to something different than an ordinary derivative action by a stockholder of a general corporation is, to say the least, a novel one.

In view of such previous construction of that section of the Illinois statutes, it could not have been anticipated that a different construction would be placed upon Section 201, as was done in the second opinion of the Supreme Court of Illinois although not in the first opinion. Under such circumstances the federal question may be raised for the first time on a petition for rehearing. *Herndon* v. *Georgia,* 295 U. S. 441 and cases cited; *Missouri* v. *Gehner,* 281 U. S. 313; *Saunders* v. *Shaw,* 244 U. S. 317.

Actually it was raised by petitioners, in the instant case, prior to the second opinion of the Supreme Court of Illinois, in their answer to respondents' petition for rehearing of the first opinion. Where the state Court ruling is such that it construes the state statute to mean one thing for some cases and another thing for others, as is the case here, an objection to its constitutional validity could not have been made in advance of the event, and if such objection is first made in the petition for rehearing, it is not too late to give this Court jurisdiction. *Great Northern Railway* v. *Sunburst Co.,* 287 U. S. 358. Even if this section had never, previously, been construed by the Supreme Court of Illinois, petitioners would not have been estopped from attacking the decision for the first time upon petition for rehearing, as being prejudicial to petitioners' rights under the federal constitution, if they did not anticipate such a prejudicial construction in the earlier stages of the case but relied

upon another, not unreasonable, construction, which they had invoked in their own behalf. *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657.

Whether the federal question was raised in the state Court, is itself a federal question which this Court will determine from an examination of the record, *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, and to preserve the protection of fundamental rights, this Court will indulge every reasonable presumption against their waiver, *Glasser* v. *U. S.*, 315 U. S. 60; *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389; *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292.

C.

The Illinois Supreme Court Failed to Determine the Federal Question Presented to It.

The only reference, in the second opinion of the Supreme Court of Illinois, to the federal question presented by petitioners is the statement quoted in the annexed petition that petitioner Petersen "may" have his remedy by application to the Director of Insurance. This statement, in addition to being erroneous as a matter of law, evades and does not determine the question of whether the awarding of the writ of mandamus does not deprive petitioner Petersen and the corporation, by him represented, of their only right of action.

It is well settled that the Constitution of the United States, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even if such claimed constitutional protection be denied on non-federal grounds, it is the province of this Court

to inquire whether the decision of the state Court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. *Lawrence* v. *State Tax Comm.*, 286 U. S. 276; *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U. S. 737; *N. Y. Central R. R. Co.* v. *N. Y. & P. Co.*, 271 U. S. 124; *Railroad Comm.* v. *Eastern Texas R. R. Co.*, 264 U. S. 79; *Davis* v. *Wechsler*, 263 U. S. 22; *Ward* v. *Love County*, 253 U. S. 17; *Creswill* v. *Knights of Pythias*, 225 U. S. 246.

That the non-federal ground of the decision of the Supreme Court of Illinois is unsubstantial has been heretofore pointed out. For that Court to say that petitioner "may" have his remedy by application to the Director of Insurance (a) ignores the allegation made by the respondents themselves (Rec. 4) that the association has been under the supervision of the Insurance Department of Illinois since April 24, 1927, and subjected to periodic examinations by it, without the Director of Insurance having seen fit to take action to correct the situation; (b) misstates the law, as petitioner Petersen could not, by legal action, require the Director of Insurance to correct the situation as (1) whether or not to take such action would be a matter within the discretion of the Director and therefore he would not be subject to mandamus (*People* v. *Allman*, 382 Ill. 156), (2) mandamus will not lie where to issue the writ would put into the hands of the Court the control and regulation of the general course of official conduct or enforce the performance of official duties generally (*Liquor Dealers Asso.* v. *Schreiber*, 382 Ill. 454; *Coughlin* v. *Chicago Park Dist.*, 364 Ill. 90; *MacGregor* v. *Miller*, 324 Ill. 113; *People* v. *Busse*, 238 Ill. 393) and (3) as any suit which the Director wished to institute would have to meet with the ap-

proval of the Attorney General, the Director alone could not be charged with the duty of prosecuting such action and therefore mandamus would not lie as approval of a third person would be necessary (*People* v. *Whelan,* 356 Ill. 328; *MacGregor* v. *Miller,* 324 Ill. 113; *People ex rel. Schoonover* v. *McLaughlin,* 278 Ill. App. 197).

The cases cited by the Supreme Court to support the statement that petitioner Petersen "may have his remedy by application to the Director of Insurance" do not determine that such remedy in fact exists. The case of *American Surety Co.* v. *Jones,* 384 Ill. 222, did not involve a mandamus action nor was it there held that there could be a review of a decision of the Director to take no action, but in that case it was held merely that competitors were not aggrieved parties within the meaning of the Insurance Code and, not being aggrieved parties, were not entitled to a judicial review of an order of the Director of Insurance. The case of *People* v. *Potts,* 264 Ill. 522, clearly distinguishes the issues in that case from one in which the writ of mandamus would require an official to exercise a duty in a particular way.

Under the Insurance Code of Illinois, Section 188 (1943 Ill. Rev. Stats. Chap. 73, par. 800), the Director of Insurance may, under the conditions prescribed therein, request the Attorney General to apply for a rule upon a company to show cause why it should not be liquidated or rehabilitated or for such other relief as the nature of the case and the interest of its policyholders, creditors, members, stockholders or the public may require. That section of the Insurance Code prescribes the grounds upon which the Director of Insurance may request the Attorney General to act. The causing, by its officers and directors, of an insurance company to pay

to such officers and directors unconscionable sums for the performance of no services other than they are required to perform in the course of their regular duties, is not one of the grounds provided by the statute, upon which the Director of Insurance may take action. The Director could, therefore, resist any attempt, based upon such a condition, to mandamus him to take action. In two other states, Directors of Insurance have seen fit, on their own initiative, to refuse to renew the license of insurance companies where such condition existed. *State ex rel. Celina Mutual Casualty Co.* v. *Conn.,* 115 Oh. St. 607, 155 N. E. 138, 50 A. L. R. 473; 117 Oh. St. 190, 157 N. E. 563, appeal dismissed 276 U. S. 596; *Caminetti* v. *State Ins. Co.,* 126 Pac. 2nd. 165, 52 Cal. App. 2nd. 321; *Caminetti* v. *National Guaranty Life,* 126 Pac. 2nd. 170, 52 Cal. App. 2nd. 835; *Caminetti* v. *Guaranty Union Life Ins. Co.,* 126 Pac. 2nd. 159, 52 Cal. App. 2nd. 330, (hearing denied by California Supreme Court).

The respondent insurance company here is solvent and the damage which would be done to its business, if control of it were taken over by the Director of Insurance as by that statute permitted, would be, indeed, great. Only benefit can result to the company if Petersen's suit is successful, while no harm can result if his suit should be unsuccessful.

As there is lacking any method by which the company or petitioner Petersen can require the Director of Insurance to proceed to rectify the wrongs which the officers and directors have committed and are committing, the awarding of the writ of mandamus has deprived the company, as well as Petersen and the other members whom he represents, of all remedies to enforce the liability of the individual respondents to the company.

CONCLUSION.

We respectfully submit that the Supreme Court of Illinois has decided a federal question of substance in a way not in accord with applicable decisions of this Court and without justification in law and we therefore respectfully submit that, in view of the novelty of the questions presented, and their great importance, they are worthy of review by this honorable Court.

Respectfully submitted,

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